DIRECTOR-GENERAL OF INLAND REVENUE v. N.P.K.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) February 4, 1975]

[Kota Kinabalu — Federal Court Civil Appeal No. 77 of 1974]

Income Tax — Transfer of rights to extract and sell timber — Whether consideration received liable to tax as gain or profit from business — Sabah Income Tax Ordinance, 1956, s. 9(1).

The respondent, a timber merchant and timber hauling contractor, had submitted a tender for the extraction and sale of timber and as he and one Voo Khen & Sons Ltd. were the highest tenderers, they were awarded the tender jointly. Subsequently the respondent and Voo Khen assigned their rights to extract timber to one Tio Chee Hing. The respondent was assessed to tax on the consideration he received for the transfer of his rights. The Special Commissioners held that the sums received constituted income in respect of gains or profits from a business and were assessable to tax under section 9(1) of the Sabah Income Tax Ordinance, 1956. On appeal, the High Court held the transfer of the rights was an isolated transaction and the sums received were not assessable to tax. The Director-General of Inland Revenue appealed to the Federal Court.

Held, allowing the appeal: the sums received were profits which fell within section 9(1)(a) of the Sabah Income Tax Ordinance and were assessable to tax.

Cases referred to:-

(1) *Edwards* v. *Bairstow* 36 T.C. 207, 231.

(2) *D.E.F.* v. *Comptroller of Income Tax* [1961] M.L.J. 55.

(3) *E.* v. *Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117.

(4) *Murray's Case* 32 T.C. 238.

(5) *T. Beynon and Co. Ltd.* v. *Ogg* 7 T.C. 125, 132, 133.

(6) *Rellin Ltd.* v. *Vise (H.M. Inspector of Taxes)* 32 T.C. 254, 261.

(7) *Leeming* v. *Jones* 15 T.C. 333.

(8) *Great Western Railway Company* v. *Bater* 8 T.C. 231, 244.

FEDERAL COURT.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the appellant.

Datuk Thomas Jayasuriya for the respondent.

Ong Hock Sim F.J.: This is an appeal by the Revenue from the decision of the High Court at Kota Kinabalu given on May 6, 1974, setting aside, with costs, the Deciding Order of the Special Commissioners of Income Tax dated March 23, 1973, to the effect:

(a) that the sum of $137,500 received by the respondent herein in the year of assessment 1967 as a consideration for the transfer of his rights to extract and sell timber situated in Tungku (Sg. Serai), Lahad Datu District, and

(b) that the sum of $12,500 received by the respondent in the year of assessment 1967 as a further consideration of the transfer of his rights to extract and sell timber,

both constituted a gain or profit from business under section 9(1)(a) of the Income Tax Ordinance 1956 (Sabah Ordinance No. 29 of 1956) and were assessable to tax under the said Ordinance.

The facts as admitted or proved are set out in paragraph 6 of the case stated for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967. The learned judge has summarised these as follows:—

"(i) In December 1964 a company known as Timber Producers of Sabah Ltd. was given a Special Licence to extract timber under the Sabah Forest Ordinance (Cap. 169). The licence covered an area of 20,000 acres to be worked initially over a period of ten years at an annual coupe of 2,000 acres. Subsequently, the Ministry of Natural Resources increased the acreage of the yearly coupes but it seems to me that this increase of the annual coupe does not affect the result of this appeal. As the extraction of timber would necessarily involve heavy initial capital outlay, Timber Producers of Sabah Ltd. decided to invite tenders for the extraction and sale of timber in the annual coupe.

(ii) The Commissioners find that the appellant (the respondent herein) is the sole proprietor of L. Timber Co. and he had submitted a tender in the name of the firm. The Commissioners have also found that Voo Khen is a majority shareholder of Voo Khen & Sons Ltd. and he has also submitted a tender in the name of the company. Altogether ten tenders were received by Timber Producers of Sabah Ltd. Since both L. Timber Co. and Voo Khen & Sons Ltd. had each submitted a tender of $1,001,000.00 and since they were the highest tenders, the Board of Directors of Timber Producers of Sabah Ltd. resolved to award the tender to both the appellant and Voo Khen jointly (Ex. A12). The Commissioners find that the appellant is also the Managing Director and Secretary of Timber Producers of Sabah Ltd. and that the appellant and Voo Khen had no business connections before.

(iii) Since the first year annual coupe of 2,000 acres of timber land happened to be adjacent to Southern Estate Ltd.'s coconut plantation (a company jointly owned by Tio Chee Hing and his wife), Tio Chee Hing managed to persuade the appellant and Voo Khen to transfer or assign their rights to extract timber to him for an agreed consideration of $275,000.00. It was further agreed that if the export of timber should exceed 2 millions cubic feet, Tio Chee Hing agreed to pay to the appellant and Voo Khen an additional sum of $25,000.00. A Chinese agreement written out by Tio Chee Hing was executed (Ex. A17) and a certified English translation is attached (Ex. A2, folio 6). The appellant's share of these payments amounting to $137,500.00 and $12,500.00 respectively.

(iv) Tio Chee Hing made out all payment vouchers in the names of the appellant and Voo Khen jointly but all payments in respect of the tender monies were made directly to Timber Producers of Sabah Ltd. except on one or two occasions when Tio Chee Hing paid through the appellant. However, Timber Producers of Sabah Ltd. made out receipts in respect of the tenders monies in the joint names of the appellant and Voo Khen. The appellant and Voo Khen appointed Tio Chee Hing as the local representative at Lahad Datu of Timber Producers of Sabah Ltd. All documents relating to the shipment of timber, such as Bill of Ladings, Customs permits and export permits, were prepared by Southern Estate Ltd., in the name of Timber Producers of Sabah Ltd. as well as royalties paid to the government on the timber.

(v) Tio Chee Hing completed extraction of the first year's coupe of 2,000 acres of timber land and in accordance with the provisions contained in the agreement (Ex. A17). he took over the second year coupe of another 2,000 acres of timber land on the same terms and conditions."

Before the Commissioners, the respondent challenged the assessment on the grounds that the sum of $137,500 was in respect of an isolated transaction of a capital nature; alternatively that it was derived from a realisation or change of investment or from an enhancement of capital. For the Revenue, it was urged that the sum of $137,500 was income in respect of gains or profits assessable to tax under section 9(1)(a) of the Sabah Income Tax Ordinance, 1956 or alter-

natively, constituted a profit arising from property within the meaning of section 9(1)(f) of the said Ordinance.

The Commissioners were of the view that neither of the two sums constituted profits within the meaning of section 9(1)(f). This court is not required to say whether their conclusion was correct as the appellant has not appealed against that finding.

As the judge said:

"The Commissioners were of the opinion that the two sums of $137,500.00 and $12.500.00 constituted a gain or profit from business and therefore assessable to income tax under section 9(1)(a) ... as the transfer of the appellant's rights to extract and sell the timber ... constituted a commercial transaction as part of his trade as a timber merchant and timber contractor.

It then becomes necessary to consider whether there was evidence justifying the conclusion arrived at by the Special Commissioners."

I respectfully agree. I am however a little diffident when he went on to say:

In this appeal, I have to bear in mind that I am not sitting as a second tribunal to decide matters of fact. I have merely to see whether the decision or conclusion of the Commissioners was correct in law and whether there was any evidence to support their decision."

Even learned counsel for the respondent in his written submission observed:

"The learned judge did not in fact consider the case on the basis whether there was sufficient evidence. Right from the start he addressed his mind on whether there was evidence to support the Commissioners' decision and whether their conclusion was correct in law."

As Lord Radcliffe in *Edwards* v. *Bairstow*[1] said:

"As I see it, the reason why the courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason ... to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

There is no question that this appeal is governed by the Sabah Income Tax Ordinance. The relevant section is section 9. It reads:

"9.(1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Sabah or received in Sabah from outside Sabah in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;"

This section is identical with section 10(1)(a) of both the Singapore and Malayan Income Tax Ordinances, which were judicially considered in *D.E.F.* v. *Comptroller of Income Tax*[2] and *E.* v. *Comptroller-General of Inland Revenue*[3] respectively. Not one of the three Ordinances defined the word "trade" or "business". The Singapore Court of Appeal held that "the words 'trade, business, profession or vocation' in section 10(1)(a) of the Income Tax Ordinance all involve the continuous exercise of an activity" and "the term 'business' in section 10(1)(a) does not apply to one isolated act, or business transaction". In a most comprehensive and lucid judgment, Gill C.J. (F.J. as he then was) in the *E.* case, *supra*, held:

"the transaction by the appellant in this case was an isolated transaction and although it was an adventure in the nature of trade, it did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947. As it was a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute the business of the appellant either within the meaning of that section."

Numerous U.K. cases were cited on the construction of the word "trade" or "business" but it should be remembered that "trade" in the U.K. legislation is defined to include "an adventure in the nature of a trade". Such an adventure is therefore caught by the tax provisions in U.K., whereas in Singapore as in Malaysia until the recent amendment in the legislation, an adventure in the nature of a trade escaped taxation. However, there are cases in the U.K. which held that transactions though isolated constituted, in the circumstances of those cases, trade or an adventure in the nature of a trade of a taxpayer.

As is so aptly put by counsel, "it is difficult to draw principles from the cases and some of the decisions are difficult to reconcile. But as has often been said, it depends on the view one takes of the facts, and the court would not interfere if there was reasonable evidence to support the Commissioners' determination even though the courts might take a different view to them."

Let us recapitulate the facts found by the Special Commissioners. The respondent is a timber merchant and timber hauling contractor of over 20 years' standing. In the course of his normal trade as such, he obtained annual timber licences from the State Government to log and extract by himself the timber from the licensed area for export. He never bought any timber for sale or export. But the learned judge found —

"no evidence that the appellant had been carrying on any joint business venture in the timber trade with Voo Khen or others before.... This was a completely new venture entered into by the appellant. The appellant and Voo Khen had never worked together before and the Commissioners had expressly found that the parties had no business connections before....

The findings of the Commissioners are limited to the appellant trading in his personal capacity and not in respect of the joint venture he entered into with Voo Khen.... With regard to the joint venture of the appellant and Voo Khen, no conclusion has been arrived at by the Commissioners concerning this aspect of the case.... Before the Commissioners can say that the transfer of the appellant's rights to extract and sell timber on the first year coupe of 2,000 acres of timber land for valuable consideration to Tio Chee Hing constituted a commercial transaction as part of his trade as a timber merchant and contractor, there must be findings as to the scope of the trade or business of the joint venture between the appellant and Voo Khen.... In the absence of any determination of the scope of the trade or business of the appellant and Voo Khen, it seems to me quite wrong for the Commissioners to justify the finding that the appellant had carried on a trade or business as a timber merchant and timber hauling contractor and that the transfer of his said rights to extract timber from the annual coupe of 2,000 acres of timber land was an integral part of his trade."

The judge went on to say:

"In my judgment there was no evidence where the Commissioners could find that these two sums, viz. $137,500.00 and $12,500.00, arose in the course of a trade or business carried on by appellant and Voo Khen. On the facts, I am satisfied that the transfer of the rights of the appellant and Voo Khen to Tio Chee Hing was an isolated transaction and that the two sums ... received ... were not assessable to income tax under section 9(1)(a) of the Sabah Income Tax Ordinance, 1956."

The Federal Court did not say as the learned judge implied, that "a single business transaction carried on by him did not constitute business within the meaning of the sub-section". What it said for excluding it was:

"As it was but a single business transaction carried out by the appellant *and not part of a business carried on by him*, it did not constitute the business of the appellant either within the meaning of the same section."

In my opinion, there is nothing in section 9(1)(a) which enjoins that "business" of the taxpayer for purposes of assessment of liability to tax is that business carried on "all by himself" or "limited to trading in his personal capacity" or that any joint venture with another in his line of trade or business was equally not liable to tax unless he had worked together or had business connections with that other before undertaking the joint venture. I do not think that in this case, scope of the trade or business of the joint venture is necessarily relevant to the conclusion of the Commissioners that the transaction was "in the course of his normal trade as a timber merchant and timber hauling contractor". It was in his line of business that he submitted his tender. He agreed, at the request of the Board of Timber Producers of Sabah Ltd., to embark on his business, not alone but jointly with Voo Khen, a person in the same line of business and who had submitted a tender for the same amount, and to accept a smaller margin of profit by transfer of his rights to Tio Chee Hing. Both he and Voo Khen signed the agreement of February 1, 1965 with Timber Producers of Sabah Ltd. as "the contractor". The Commissioners recorded that "the appellant in his evidence said when he tendered for this land he expected to make a profit of about $800,000. Voo Khen said he expected to make a profit of between $300,000 and $500,000 while Tio Chee Hing expected to make a profit of about $300,000." There would have been no doubt that these profits would fall within section 9(1)(a).

I do not find any merit in the attempt to draw a distinction between a right to take timber and a right to the timber itself. I agree with appellant's counsel that this case is on all fours with *Murray's case*.[4] There, the licence was in respect of a right to extract and sell timber. As is said in *T. Beynon and Co., Limited* v. *Ogg*: [5]

"In my view there is no question of law really in issue here. The law seems to me to be perfectly well settled, and the only question one has to determine is which side of the line this transaction falls on. Is it in the nature of capital profit on the sale of an investment? Or is it a profit made in the operation of the appellant's business? Now that is very largely, as I think, a question of fact....

I think that there was evidence here that this transaction was a transaction, and this profit was a profit, made in the operation of the company's business. I do not for a moment intend to endeavour to define where the line ought to be drawn."

The decision in *D.E.F.'s* case is in accord with this view. The headnote reads:

"Whether or not the appellant is carrying on a trade or business is a question of mixed fact and law. If the Board of Review did not err in law, its decision on the issue of fact involved must stand unless it cannot be regarded as a reasonable decision."

I am satisfied that there is no error in law in the view of the Commissioners that the fact of its being a joint venture — a completely new one without any previous connection between the parties thereto — is not to be treated differently and solely by reason of its novelty regarded as an isolated transaction not assessable to tax. I would refer to the judgment of Singleton L.J. in *Rellim, Ltd.* v. *Vise (H.M. Inspector of Taxes*[6]*)* in which he said:

"The matter which had to be decided by the Commissioners was a question of fact and so long as there was evidence on which they could find in the way in which they did find the court should not interfere."

I would restore the Deciding Order of the Special Commissioners with costs here and in the court below.

Suffian L.P. concurred.

Lee Hun Hoe C.J. (Borneo): I have the advantage of reading the judgment of my learned brother Ong Hock Sim F.J. I agree that the appeal be allowed and that the Deciding Order of the Special Commissioners be restored.

In this appeal the question is whether or not on the facts the transaction of the respondent was part of a business carried on by him. If the answer is in the affirmative, then any profit or gain arising therefrom would be liable to tax. The contention that the agreement (Exh. A.2) constituted an absolute assignment of the rights of respondent and Voo Khen cannot be accepted. They did not part with all their rights for they had retained a share however small it might be. All the parties were interested not so much in the land but in the quantity of timber that could be extracted and exported. That this is so is clearly shown by the tender in general and the agreement in particular. Nothing is clearer than the insertion of a clause in the agreement to pay an additional sum of $25,000 if the timber exported exceeded 2 million cubic feet. The export in fact exceeded the figure and the additional sum was paid and formed the subject of additional assessment of respondent's share.

I do not see that "the scope of the trade or business of the joint venture" is relevant to the determination of the tax liability of respondent by the Commissioners. If necessary, I would say the scope of the trade or business is indicated by the tender notice and the supplementary tender which make clear what the successful tenderer would have to do. The same can be said of the licence to take timber produce. Tio Chee Hing knew about the scope since he was one of the unsuccessful tenderers. The agreement entered into by the parties reflected their clear understanding of the position. It is necessary to bear in mind that the parties to the tender and the agreement were all timber merchants or contractors and were conversant with all aspects of timber business. There is nothing unique about them entering into an agreement to extract, sell or export timber. It is all part of their normal business.

If the tender were offered to respondent solely, it would merely mean that he would not have to share the profit with anyone. It was an isolated transaction in the sense that respondent carried on timber business jointly with Voo Khen for the first time, but that did not in any way affect the nature of their business. The only difference is that the profit arising from the transaction was to be shared by them. The transaction involved was still the sale of timber.

The finding of the Special Commissioners on purely questions of fact should not be disturbed unless it was so perverse that, as a matter of law, it could not stand. In *Rellim Ltd.* v. *Vise*[6] Wynn-Parry J. made these observations: —

"The principles of law which govern this case are perfectly clear; and as the matter strikes me it is one which upon examination will be found to raise no more than a very short question — short but not thereby easy to answer — namely whether or not the Commissioners had evidence before them upon which they could properly make the finding which they did. The Commissioner's finding is expressed in these words: 'We, the Commissioners who heard the appeal, found that the company was a trading company with trading profits.' In my view that is a perfectly clear finding and is not open to the same sort of doubt to which the first finding of the Commissioners in the case of *Leeming* v. *Jones*[7] was open. Thus, one is faced at once with the crucial question in the case: Is it possible to say that there was no evidence upon which the Commissioners could properly base that finding?

....

... I have to bear in mind (for this has been laid down in many cases) that not merely is the question one of fact, but in deciding whether or not there is any evidence to support the Commissioners' finding, it is not for the court to consider how the court itself would have viewed the matter had it been *res integra*. If left free I might well have come to a different conclusion from that to which the Commissioners have come; but unless I can be satisfied that there was no evidence to support their finding, then I am bound to give effect to it."

There is nothing to suggest that the Special Commissioners have misdirected themselves in law. The finding of facts by the Special Commissioners should not be lightly disturbed even though on the materials the court might not have come to the same conclusion. Lord Atkinson in *Great Western Railway Company* v. *Bater*[8] put the position of the Commissioners clearly at page 244: —

"... Their determinations of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs."

I cannot say that on the evidence before them the Commissioners could not, as reasonable men, have come to the conclusion which they did. Section 9 of the Sabah Income Tax Ordinance, 1956 relates to the nature of the activity and not to the constitution of the business, e.g. whether the taxpayer was conducting such activity alone or in conjunction with others. The learned judge erred in not deciding whether the transaction was part of the business carried on by the taxpayer.

I would allow the appeal.

Appeal allowed.

Solicitors: *Thomas Jayasuriya & Co.*

SYARIKAT SOON THEAM SDN. v. H'NG CHYE JIN

[O.C.J. (Chang Min Tat J.) October 3, 1974]
[Penang — Civil Suit No. 187 of 1973]

Stock Exchange — Purchase of shares — Role of stock-broker — Obligations of purchasers — Mitigation.

A share-broker is by his designation not a contracting party but is an agent who arranges for the "marriage" of an order to buy with an order to sell.

Once a broker has received an order from his client, his authority to complete it and so rid himself of the personal liability undertaken by him within the rules of the Stock Exchange cannot be revoked. The authority could only be revoked before it had been acted upon.

A broker who had bought shares for his client is under no obligation to re-sell them.

[Editorial Note: Reference may be made to *Macphail & Co. (Ipoh) Ltd.* v. *Oam Prakash* [1969] 2 M.L.J. 19.]

Cases referred to:-

(1) *Taylor* v. *Stray* (1857) 2 C.B.N.S. 175; 140 E.R. 380.
(2) *Seymour* v. *Bridge* (1885) 14 Q.B.D. 460.
(3) *Fletcher* v. *Marshall* (1846) 15 M. & W. 755; 153 E.R. 1055.
(4) *Thacker* v. *Hardy* (1878) 4 Q.B.D. 685 C.A.

CIVIL SUIT.

Philip Hoalim Jr. for the plaintiff.

Ariffin bin Haji Daud for the defendant.

Chang Min Tat J.: The plaintiff is a firm of share-brokers and is claiming from the defendant $13,103.00 which is the difference between the purchase price of the 10,000 Haw Par Bros. (International) Limited shares, said to be bought by the plaintiff for the defendant and subsequently sold by the plaintiff as a result of the failure of the defendant to take up the shares.

The defence was that the defendant had never at any time placed the order for the purchase of such shares.

It is common ground that the shares were purchased on the 29 March 1973. It is also agreed between the parties that a few days before this date the defendant was introduced to Yeo Khee Nam, a director of the plaintiff firm.

The evidence of what actually transpired on the 29 March is at variance. The director, Yeo Khee Nam, alleged that before trading commenced that day the defendant appeared at his administrative room and there placed an order for 10,000 Haw Par at best. When trading opened at 10.00 a.m. he passed this order to his operator Ong Liang Thye who was in charge of the centralised buying and selling of shares for the firm. This Ong Liang Thye placed the order with the Kuala Lumpur Stock Exchange. The director also rang up the Singapore Stock Exchange to check prices. In the course of this telephone communication, he managed to obtain 3,000 Haw Par at $8.65¢. He notified the defendant who according to him accepted the purchase but told him not to proceed with the purchase of the balance. Yeo Khee Nam then told the defendant that before he could cancel the order he had to confirm that the order had not been executed. But he was informed by Ong Liang Thye that the Kuala Lumpur representative had bought the remain-